

No. 18665

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS SULMEYER, Trustee,

Appellant,

vs.

ARTHUR DONALD PFOHLMAN,

Appellee.

APPELLANT'S OPENING BRIEF.

EDWARD M. MONEYMAKER,

WILLIAM J. TIERNAN,

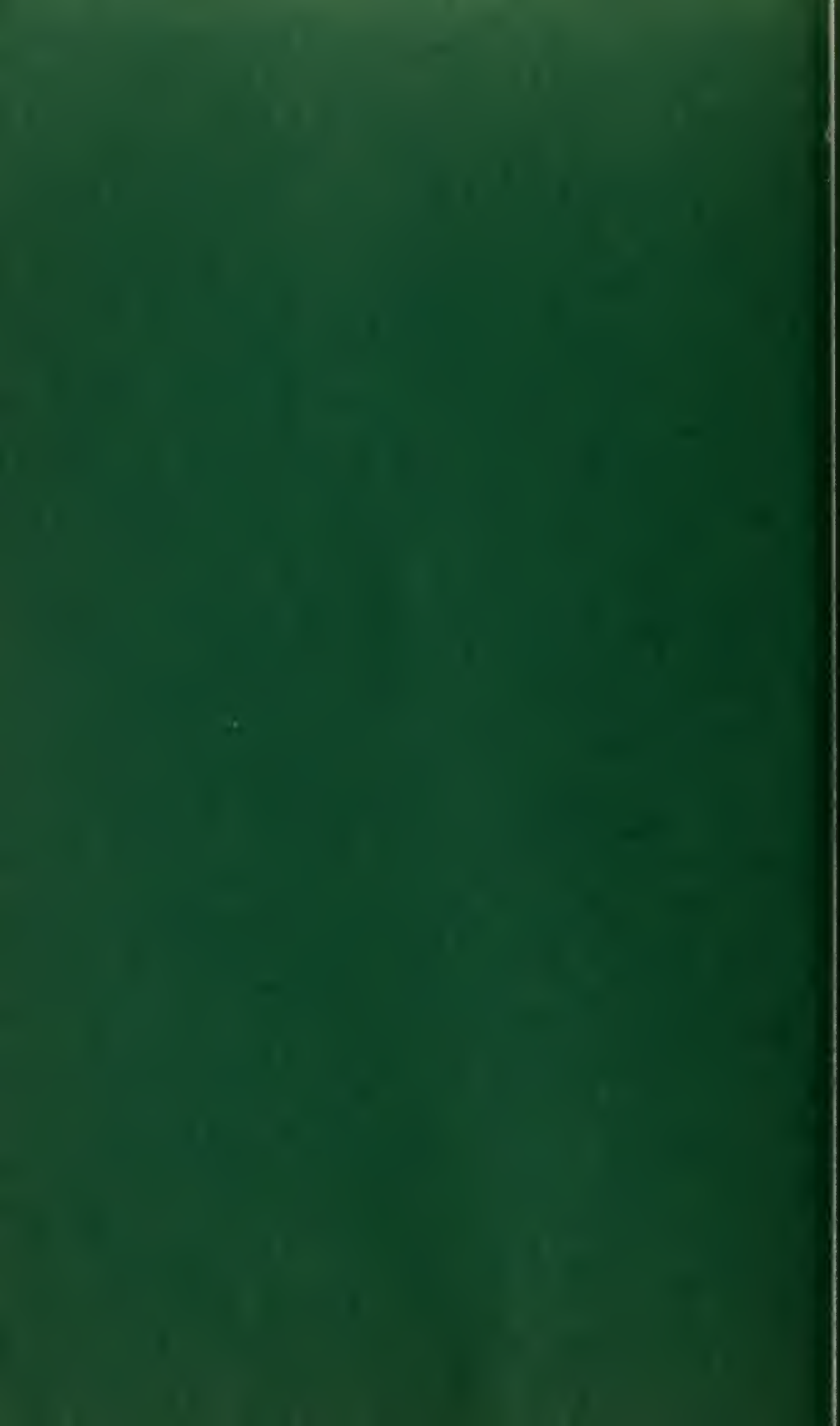
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FOR THE NINTH CIRCUIT

IRVING SULMEYER, Trustee,

Appellant,

vs.

ARTHUR DONALD PFOHLMAN,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final Judgment made and entered in the United States District Court for the Southern District of California, Central Division and this Appeal is prosecuted in accordance with the provisions of Rule 72 *et seq.* of the Federal Rules of Civil Procedure in the United States District Courts.

On June 15, 1961, Arthur Donald Pfohlman filed his Voluntary Petition in Bankruptcy.

On May 25, 1962, the Trustee, the Appellant herein, filed with Ray H. Kinnison, Referee in Bankruptcy, an Application to Determine Status of Real Property and Trustee's Title thereto, to Restrain a Superior Court Action and for a Temporary Restraining Order [Clk. Tr. p. 1].

On May 25, 1962, Ray H. Kinnison, Referee in Bankruptcy, issued an Order to Show Cause *re* Title to Real Property [Clk. Tr. p. 13].

On June 1, 1962, the respondent herein, Lois E. Pfohlman, wife of the bankrupt, filed a document entitled "Objection to Jurisdiction of Court" [Clk. Tr. p. 15].

On June 4, 1962, a hearing was held upon the Trustee's Application, and the Order to Show Cause issued thereon, and the Respondent's Objections to the Summary Jurisdiction of the Bankruptcy Court.

On June 6, 1962, Ray H. Kinnison, Referee in Bankruptcy, made and entered an order entitled "Order Overruling Objections to Summary Jurisdiction, Continuing Restraining Order and Submitting the Matter for Decision" [Clk. Tr. p. 29].

On July 9, 1962, the respondent, Lois E. Pfohlman, filed a document with the Clerk of the United States District Court for the Southern District of California, Central Division, entitled "Motion for Order Permitting Suit in State Court, Declaration in Support thereof and Points and Authorities" [Clk. Tr. p. 31].

On August 7, 1962, Ray H. Kinnison, Referee in Bankruptcy, filed a document entitled "Referee's Certificate on Review from Referee's Order, dated June 6, 1962" [Clk. Tr. p. 54].

On December 17, 1962, a hearing upon review was heard before the Honorable Pierson M. Hall, Judge of the United States District Court, Southern District of California, Central Division, on the basis of Points and Authorities submitted by both sides.

On February 25, 1963, the Honorable Pierson M. Hall, entered a document entitled "Order for Petition for Review" [Clk. Tr. p. 85].

On March 12, 1963, The Respondent lodged a document entitled Findings of Fact, Conclusions of Law and Order—Order on Petition for Review which document was entered by the court, March 13, 1963 [Clk. Tr. p. 93].

The Trustee thereupon filed a Notice of Appeal to the above entitled Court [Clk. Tr. p. 105].

Statement of the Case.

Arthur Donald Pfohlman, the bankrupt, filed a Voluntary Petition in Bankruptcy on June 15, 1961 and it was duly adjudicated a Bankrupt on said date.

Arthur Donald Pfohlman, and Lois E. Pfohlman, the respondent herein, are husband and wife, but Lois E. Pfohlman has not filed bankruptcy.

On the date of bankruptcy and all times hereafter, the bankrupt and his wife, Lois E. Pfohlman have resided on and are residing on a parcel of real property located at 2009 Seventh Street, La Verne, California.

The bankrupt has scheduled that parcel of real property in his Bankruptcy Schedules and failed to claim it as exempt. That on June 15, 1961, the date of bankruptcy, neither the bankrupt, nor his wife, had recorded a Declaration of Homestead, claiming said parcel exempt as their Homestead.

July 12, 1961 the Trustee filed his Report of Exempt Property, setting aside the exempt property claimed by the bankrupt, but making no mention of the real property.

On June 19, 1961, four days following the filing of the Voluntary Bankruptcy, the bankrupt and his wife,

filed a joint Declaration of Homestead, containing a defective description.

On July 20, 1961, the Trustee filed his Amended Report of Exempt Property, refusing to set aside as exempt the real property described, upon the grounds that the Homestead Declaration was recorded subsequent to bankruptcy and did not contain a legal description of the property belonging to the bankrupt and his wife.

On August 21, 1961, an abandonment of that Homestead was recorded in the official records of Los Angeles County.

On August 22, 1961, two months after filing the bankruptcy, the bankrupt and his wife executed a second joint Declaration of Homestead, with a proper description of the real property, which was recorded August 24, 1961 in the records of the Los Angeles County.

On May 17, 1962, the bankrupt and his wife filed an action in the Superior Court of the State of California to determine their interest in said real property and named the Trustee in Bankruptcy as defendant in that action. The State Court action was filed without prior permission being obtained from the Bankruptcy Court.

On May 25, 1962, the Trustee in Bankruptcy filed with the Referee in Bankruptcy the Application to determine the status of the real property and the Trustee's title thereto, and to restrain the Superior Court Action and for a Temporary Restraining Order [Clk. Tr. p. 1]. The Trustee contended in the Application that the property, while standing as a record joint

tenancy, was actually community property and passed to the Trustee by operation of law.

On May 25, 1962, an Order to Show Cause was issued by the Referee in Bankruptcy and was set for hearing on June 1, 1962. The respondent, Lois E. Pfohlman, filed a document entitled "Objections to the Jurisdiction of the Court" [Clk. Tr. p. 15].

On June 4, 1962, a hearing was held upon the Application and evidence was taken by the Referee. Following that hearing, the Referee overruled the objection of the respondent, Lois E. Pfohlman to the summary jurisdiction of the Court, submitted all matters for further consideration, and asked for both parties to submit Memorandums of Points and Authorities and entered a written order to that effect [Clk. Tr. p. 29] on June 6, 1962. It was from that order of June 6, 1962 that the respondent, Lois E. Pfohlman sought a review.

ARGUMENT.

POINT ONE.

The Motion for Order Permitting Suit in State Court, Declaration in Support Thereof and Points and Authorities Filed July 9, 1962 Was Neither Timely nor Proper as to Form.

The order appealed from overruling the respondent's objections of the summary jurisdiction of the Court was not an appealable order. Such an issue could have been determined by an appeal from the Order on the merits when made. Thus the appeal was premature.

Pearson v. Higgins, 34 F. 2d 27, 14 A. B. R. (N. S.) 386 (CCA 9 1929).

Not only was the appeal premature, but the motion for review filed with the United States District Court was defective for the following reasons: (a) the motion was filed more than 10 days after the entry of the order without any intervening extension of time being granted by the Referee; (b) the Motion was not filed with the Referee, but rather with the clerk of the United States District Court; (c) the form of the motion did not comply with either Section 39(c) of the Bankruptcy Act, nor with Local Rules of Bankruptcy, Southern District of California No. 204.

A. No extension was either sought or granted for the respondent's review of the order of the Referee entered June 6, 1962. The motion seeking to review that order was filed July 9, 1962, more than one month later. Section 39(c) of the Bankruptcy Act reads as follows:

“A person aggrieved by an order of a Referee may, within ten days after the entry thereof or within such extended time as the court upon peti-

tion filed within such ten-day period may for cause shown allow, file with the Referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.”

This section is generally exclusive and must be strictly followed; and any attempt to obtain review by certiorari, original petition, appeal, or other indirect process will be unavailing.

Collier on Bankruptcy, Vol. 2, Sec. 39.16, page 1479.

Section 39(c) was amended in 1960 to permit a review only if the application for it is filed within the ten day period or an extension thereof. Court should note that this differs from the Federal Rule 6(b)(1) for the United States District Courts, which usually permit a motion for an extension of time to be made after the expiration of the prescribed period.

Collier on Bankruptcy, Vol. 2, Sec. 3920 (4.1), page 1496.

In one of the few cases decided after the 1960 amendment, *In Re Watkins*, 197 F. Supp. 500 (WD Va. 1961), the court said:

“There is no longer any inherent discretionary power in the District Judge to grant a petition for review after the ten-day period or any extension granted on a request made within such period has expired.”

Therefore, under all available authority, it is clear that the Referee’s order overruling the objections of the respondent to the summary jurisdiction of the court was final.

B. Secondly, the motion filed by the respondent was not filed with the Referee in Bankruptcy, but directly with the District Court. Unless a petition for review is filed with the Referee, the District Court has no authority to review the action of the Referee.

California State Board of Equalization v. Sampsell, 196 F. 2d 252 (1952);

In Re Russell, 105 Fed. 501, 5 A. B. R. 566 (DC Cal. 1900);

Collier on Bankruptcy, Vol. 2, Sec. 39.22, page 1501.

C. Thirdly, the motion filed July 9, 1962 conformed in no way with the requirements set forth in Section 39(c) of the Bankruptcy Act. It did not set forth the order complained of and the alleged errors in respect thereto, and was therefore defective.

Calif. State Board Equalization v. Sampsell (*Supra*);

Matter of Moskowitz, 63 F. Supp. 1000 (WD Ky. 1946).

POINT TWO.

The Bankruptcy Court Had Summary Jurisdiction to Determine the Extent of the Bankrupt's Interest in the Real Property Upon Which He Is Residing.

The bankrupt and his wife, Lois E. Pfohlman, the respondent herein, were both residing on the property on the date of bankruptcy. Where a controversy exists concerning property in the actual or constructive possession of the Bankruptcy Court, the Court may adjudicate summarily all rights and claims pertaining thereto.

Taubel-Scott-Kitzmilller Co. v. Fox, 264 U. S. 421, 432, 2 A. B. R. (N. S.) 912, 44 S. Ct. 396, 68 L. Ed. 770 (1924);

Magnolia Petroleum Co. v. Thompson, 106 F. 2d 217, 41 A. B. R. (N. S.) 88 (CCA 8 1939) rev'd on other grounds, *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 42 A. B. R. (N. S.) 216, 60 S. Ct. 628, 84 L. Ed. 876 (1940);

Schultz v. England, 106 F. 2d 764, 41 A. B. R. (N. S.) 249 (CCA 9 1939).

Constructive possession occurs where the property is in the physical possession of the Bankrupt at the time of the filing of the petition, but is not delivered by him to the Trustee.

Taubel-Scott-Kitzmilller Co. v. Fox (Supra);

In Re Rosser, 101 Fed. 562, 4 A. B. R. 153 (CCA 8 1900).

This rule applies even where the bankrupt's possession is not exclusive.

In Re Wegman Piano Co., 228 Fed. 60, 36
A. B. R. 210 (DC N. Y. 1915);

In Re Brooks, 91 Fed. 508, 1 A. B. R. 531
(DC Vt. 1899);

Remington on Bankruptcy, Vol. 5, Sec. 2145,
page 285.

The major error in the District Court ruling and the central fallacy in the respondent's contentions, is that the Referee in Bankruptcy has no jurisdiction to determine the wife's interest in the realty, since she was in possession as a record joint tenant. However, the only test required is whether the *bankrupt* was in possession as a record joint tenant on the date of filing the petition. Since he was in possession, and still is, and since a joint tenancy deed amounts only to a rebuttable presumption as to the true status of the real property under the law of California (*Socol v. King*, 36 Cal. 2d 342, 223 P. 2d 627 (1950)), the Referee had summary jurisdiction to determine the true extent of the bankrupt's interest by authority of the decisions just cited.

POINT THREE.

The Referee in Bankruptcy Has Jurisdiction to Restrain the Respondent From Proceeding in a Plenary Suit Against the Trustee Filed Without First Obtaining Leave of the Bankruptcy Court Which Appointed the Trustee.

The respondent may not proceed against the Trustee without first obtaining leave of the court which appointed the Trustee, under the implied limitation contained in 28 U. S. Code 959(a). Since the State Court proceeding was simply a suit to quiet title to real property, and commenced without leave of the Bankruptcy Court, it was properly enjoined.

Vass v. Conron & Bros. Co., 59 F. 2d 969,
21 A. B. R. (N. S.) 546 (CCA 2 1932).

POINT FOUR.

The Referee in Bankruptcy Has Jurisdiction to Permanently Restrain the Respondent From Litigating Title to Real Property in a State Court Suit, Since the Bankruptcy Court Already Had Constructive Possession.

The Bankrupt was in possession of the realty on June 16, 1961, the day he filed his petition in bankruptcy, and thus the Bankruptcy Court gained constructive possession of the property.

Taubel-Scott-Kitzmiller v. Fox (supra);

In Re Rosser (Supra).

The State Court suit was not commenced until May 17, 1962 in an attempt to determine the Trustee's interest in the realty. Therefore, since the Bankruptcy

Court first acquired custody of the realty, it had exclusive jurisdiction.

Chicago RI. & PR. Co. v. Owatonna, 120 F. 2d 226, 46 A. B. R. (N. S.) 235 (C.A. Minn. 1941);

Remington on Bankruptcy, Vol. 5A, Sec. 2354, page 76.

Dated: 30th day of July, 1963.

RICHARD M. MONEYMAKER,
Attorney for Trustee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD M. MONEYMAKER

